

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

KATHLEEN SHINN and RICHARD SHINN, *et al.*,)
)
 Plaintiffs,)
)
 vs.)
)
 BAXA CORPORATION, *et al.*,)
)
 Defendants.)
 _____)

Case No. 2:07-cv-01648-JCM-PAL

ORDER

(Mot/Compel - Dkt. #112)

Before the court is a Motion to Compel Production of Documents (Dkt. #112) filed by Cross-Defendants Summerlin Hospital Medical Center, LLC, Summerlin Medical Center, LP, and UHS Holding Company, Inc., (“the Summerlin Defendants”). The court has considered the motion, Claimant/Counterdefendant Baxa’s Opposition (Dkt. #115), the Summerlin Defendants’ Reply (Dkt. #118) and the arguments of counsel at a hearing conducted March 8, 2011.

BACKGROUND

The complaint in this case was filed in state court and removed (Dkt. #1) December 10, 2007. It was initiated as an action by the parents of an infant born on October 19, 2006 who was treated at Summerlin Hospital. Baby Alyssa died at Summerlin Hospital November 9, 2006. The infant was administered a lethal dose of zinc intravenously through a Total Parental Nutrition (“TPN”) device which provided her nutrition. The Plaintiffs settled their claims against Summerlin Hospital prior to filing suit and filed a complaint against Baxa. In an Order entered July 7, 2008 (Dkt. #5) the undersigned granted Summerlin Hospital’s Motion to Intervene and For Good Faith Settlement (Dkt. #23), finding the settlement reached was a good-faith settlement for purposes of NRS 17.245(1)(b) and therefore, discharged the settling parties from all liability for contribution and equitable indemnity, but did not preclude Baxa from pursuing any rights expressly provided for in a written agreement. See NRS

1 17.245(2). The Shinns settled with Baxa shortly before the hearing on Summerlin's motion to
2 intervene. Baxa is now pursuing contractual indemnity claims against the Summerlin Defendants.

3 Counsel for Baxa tendered its defense of the underlying wrongful death action to Summerlin
4 Hospital December 6, 2007. Baxa claims Summerlin Hospital was contractually required to indemnify
5 and defend it in the underlying wrongful death action, pursuant to a Baxa MicroMacro 23 Compounder
6 and Supplies Agreement dated June 27, 2003 and a Baxa Extacta-Mix 2400 Compounder and Supplies
7 Agreement dated August 23, 2007. Summerlin Hospital refused to accept the tender of defense or
8 indemnify Baxa because it had a \$1,000,000.00 per claim deductible on its insurance. Baxa made
9 demands on the Summerlin Defendants to reimburse it for the settlement reached with the Shinns.
10 However the Summerlin Defendants disclaimed any responsibility to reimburse Baxa for the settlement
11 amount. As a result, Baxa filed a motion for leave to file a crossclaim against the Summerlin
12 Defendants December 22, 2008 (Dkt. #64), which was granted by the District Judge in an Order entered
13 February 6, 2009 (Dkt. #67). In its crossclaim Baxa asserts claims for express contractual indemnity,
14 breach of contract, breach of the implied covenant of good faith and fair dealing and declaratory relief.
15 The Summerlin Defendants have asserted counterclaims against Baxa for breach of contract, breach of
16 warranty, negligence, and strict liability.

17 The current motion involves a discovery dispute concerning a request for production of
18 documents served by the Summerlin Defendants on Baxa June 1, 2010. The Summerlin Defendants
19 seek an order compelling Baxa to produce documents responsive to Requests No. 1 - 6¹ which seek
20 documents related to the underlying Shinn v. Baxa action, including documents involving Baxa's
21 assessment, defense, and strategy. Baxa served responses July 20, 2010, objecting to each of these
22 requests on various grounds. Specifically, it objected to documents responsive to Request Nos. 1-5, and
23 16 on the grounds they were protected by the attorney-client privilege or work-product doctrine.

24 The Summerlin Defendants argue that Baxa has put at issue the reasonableness and necessity of
25 the settlement it reached with the Shinns, and has therefore waived its right to assert privilege over any
26

27 ¹The motion refers to the disputed discovery Requests 1 - 6 on page 5. However, on page 6, the
28 motion indicates Baxa objected to producing documents responsive to Requests 1 - 5 and 16.

1 settlement documents, and all documents and evidence related to its defense of the Shinn Plaintiffs'
2 wrongful death action. The Parties exchanged correspondence in an effort to resolve this dispute
3 without court intervention. On September 10, 2010 Baxa served Supplemental Responses to
4 Defendants' First Request for Production. Baxa produced correspondence between its counsel and the
5 Shinn Plaintiffs' counsel responsive to Request No. 1, but continued to withhold documents responsive
6 to Requests No. 2-5, and 16. The deposition of Baxa's corporate representative, Perry Crumbaker, was
7 taken January 11, 2011. Counsel for the Summerlin Defendants sought to question Mr. Crumbaker
8 about Baxa's analysis, strategy, and decision to settle the Shinn v. Baxa action to obtain information
9 concerning Baxa's claim for indemnity. However, counsel for Baxa refused to allow Mr. Crumbaker to
10 answer questions regarding Baxa's understanding of its liability to the Shinn, its decision to participate
11 in a mediation with the Shinn or its decision to settle with the Shinn. The Summerlin Defendants
12 claim the parties engaged in numerous meet and confer sessions to attempt to resolve their remaining
13 disputes without success.

14 The Summerlin Defendants assert the documents are relevant and discoverable within the
15 meaning of Fed. R. Civ. P. 26(b)(1). The Summerlin Defendants also argue that in this federal
16 diversity action, Nevada State law on privilege applies, citing Fed. R. Evid. 501. The Summerlin
17 Defendants dispute the documents are privileged. However, even if the documents would otherwise be
18 privileged, the Summerlin Defendants assert the at-issue doctrine operates as a waiver of existing
19 privilege protections, because by filing a claim against the Summerlin Defendants for indemnity, Baxa
20 has put at issue the reasonableness of its settlement with the Shinn.

21 The Summerlin Defendants argue that under Nevada law the party seeking indemnity is required
22 to establish that it was legally liable to the party with whom the settlement was made, and that the
23 settlement itself was reasonable, citing *Land Resources Development v. Kaiser Aetna*, 100 Nev. 29, 37,
24 676 P. 2d 235, (1984). The Summerlin Defendants rely on a Washington appellate case which
25 identified the factors a court may consider in determining whether a settlement was reasonable. *See*
26 *Chaussee v. Maryland Cas. Co.*, 60 Wash. App 504, 803 P.2d 1339 (Wash. App Div. 1, 1991). The
27 decision outlined many factors the court may consider including: (1) the releasing person's damages;
28 (2) the merits of the releasing person's liability theory; (3) the merits of the released person's defense

theory; (4) the released person's relative fault; (5) the risk and expenses of continued litigation; (6) the released person's ability to pay; (7) any evidence of bad faith, collusion, or fraud; (8) the extent of the releasing person's investigation and preparation of the case; and (9) the interest of the parties not being released. *Id.* Thus, all documents related to Baxa's analysis of its potential liability to the Shinns, especially those prepared in preparation for mediation of the dispute, as well as the advice and case analysis of counsel are at issue, and Baxa's lawsuit has impliedly waived any privileged that might otherwise apply. The Summerlin Defendants rely on the Nevada Supreme Court articulation of the at-issue waiver in *Wardleigh v. Second Judicial Dist.*, 111 Nev. 345, 891 P. 2d 1180 (1995).

In this indemnity action against the Summerlin Defendants Baxa takes the position it had no liability to the Shinns, but has refused to explain why it settled with them. As a result, the Summerlin Defendants request an order compelling the production of documents responsive to Request Nos. 2-5, and 16 and entries Nos. 1-39 on Baxa's Privilege Document Log.

Baxa opposes the motion asserting the Summerlin Defendants have failed to comply with their meet and confer obligations under Fed. R. Civ. P. 37(a)(1) and L.R. 26-7. Specifically, Baxa claims the Summerlin Defendants have not provided the certificate required by L.R. 26-7(b) or the meet and confer obligations imposed by *Shufflemaster, Inc. v. Progressive Games, Inc.*, 170 F. R. D. 166 (D. Nev. 1996). Counsel for Baxa argues the Summerlin Defendants waited for six months after engaging in initial meet and confer efforts and unilaterally filed this motion without further efforts to resolve the dispute.

Baxa disputes that it has waived the attorney-client privilege and work-product doctrine with respect to privileged documents because it has brought this indemnity action. Baxa claims that the Summerlin Defendants position is based on a "misapprehension of the case law regarding the requirements that must be satisfied for a party to be entitled to indemnification." Baxa disputes that it is required to demonstrate that it is legally liable to the Shinns or that the settlement was reasonable asserting the cases cited by the Summerlin Defendants are inapposite. Baxa argues this case is distinguishable from the Nevada Supreme Court's decision in *Land Resources Development v. Kaiser Aetna* because in this case Baxa tendered defense of the underlying action to the Summerlin Defendants, and the Summerlin Defendants refused to assume Baxa's defense and indemnify it. Baxa

1 acknowledges that the *Land Resources* case does not expressly state there was a tender of defense,
2 however, it believes this must have occurred because of a jury instruction quoted by the Nevada
3 Supreme Court in the decision. Baxa believes that the fact that the Summerlin Defendants rejected its
4 tender of defense is important because Ninth Circuit case law holds the party seeking indemnity for a
5 settlement it reached must only prove there was a *potential* for liability to prevail on an indemnity
6 claim.

7 Baxa also asserts it does not need to prove it was legally liable to the Shinns, or that the
8 settlement amount was reasonable because its claims are based on two written indemnification
9 agreements. The June agreement between Baxa and Summerlin Hospital included a provision that
10 required Summerlin Hospital to maintain insurance covering bodily injury and property damage
11 resulting from Summerlin Hospital's use of the TPN equipment Baxa leased to it, and required Baxa to
12 be named as an additional insured on the policy. This contractual provision, Baxa argues, "equates to
13 an indemnification provision pursuant to Colorado Statutes and a Colorado Appellate Court decision
14 holding that a liability insurance policy is a "species of indemnity contract". (Baxa maintains Colorado
15 law applies to interpretation of the parties' June agreement because of a choice of law provision in it.)

16 Additionally, the parties' August agreement contains an indemnification clause that required
17 Summerlin Hospital to indemnify, defend and hold Baxa harmless against claims arising from
18 Summerlin Hospital's negligence. Because the parties have express written indemnification agreements
19 Baxa maintains it is only required to establish *potential* liability to the Shinns to be entitled to
20 indemnification from the Summerlin Defendants. Thus, Baxa has not placed its understanding of legal
21 liability to the Shinns or the reasonableness of the settlement it reached with the Shinns at issue, and
22 has not waived the attorney-client privilege or the work-product doctrine, and the motion to compel
23 should be denied. Baxa maintains it will be able to demonstrate it was potentially liable to the Shinns
24 because they were sympathetic plaintiffs, the underlying action involved the death of an innocent
25 premature baby, there was wide-spread local and national media coverage of the investigations
26 conducted by the Pharmacy Board and Nursing Board, and the underlying action was set for a jury trial.

27 Baxa also contends that the Summerlin Defendants' motion is untimely because the Summerlin
28 Defendants waited until the last day of the discovery cutoff, six months after Baxa served its discovery

1 responses, to file the motion. The Summerlin Defendants have known since July 2010 when Baxa
2 served its responses and engaged in telephonic dispute resolution conferences that Baxa would be
3 claiming privilege for the withheld documents. In follow-up written correspondence in August 2010
4 Baxa reiterated its position. Baxa served supplemental responses to Summerlin's Request of
5 Production in September 2010 and again maintained its objections and indicated it would not be
6 producing privileged documents. Under these circumstances, Baxa argues the Summerlin Defendants
7 should have filed a motion to compel months earlier and that if the motion to compel is granted
8 additional discovery will be sought which will undoubtedly delay these proceedings to Baxa's
9 detriment.

10 Finally, Baxa contends the Summerlin Defendants have refused to provide Baxa with the same
11 type of information that they seek in this motion to compel. During discovery Baxa requested that the
12 Summerlin Defendants provide documents and information concerning their investigations and analysis
13 of baby Alyssa's death, their assessment of their own liability to the Shinns, and their rationale for their
14 settlement with the Shinns. Baxa also took a Rule 30(b)(6) deposition of the Summerlin Defendants
15 requesting the same type of information. The Summerlin Defendants served Baxa with a response to
16 the Rule 30(b)(6) deposition notice refusing to respond to these inquiries. The Summerlin Defendants
17 asserted the attorney-client privilege and work-product doctrine with respect to the deposition topics
18 seeking Summerlin Hospital's assessment of its potential liability to the claims of the parents of Alyssa
19 Shinn which resulted in the settlement of the Shinn family claims. The Summerlin Defendants also
20 objected to deposition questioning of their Rule 30(b)(6) designees on these topics.

21 The Summerlin Defendants' reply reiterates arguments that documents withheld from
22 production and listed on Baxa's privilege log should be compelled to be produced because by seeking
23 indemnity for the settlement Baxa reached with the Shinns it has placed these documents at issue and
24 waived privilege protection. The Summerlin Defendants dispute that language in the parties' written
25 Baxa MicroMacro TM Compounder and Supplies Agreement requiring it to maintain insurance
26 constitutes an agreement to indemnify. The Summerlin Defendants argue that contractual language
27 requiring it to maintain general liability insurance naming Baxa as an additional insured did not require
28 it to defend Baxa in lawsuits filed against it. Rather, it established a duty to *maintain* insurance.

1 Additionally, Baxa's legal argument is a "red herring" in this case because "in this case there was no
2 liability insurance policy issued by any Summerlin Defendant to Baxa."

3 The Summerlin Defendants also argue that the August 2007 agreement is "wholly irrelevant to
4 Baxa's claims for indemnity in this case." Baxa's claim for indemnity arises under language in the
5 November 2003 agreement which was the contract in effect at the time of baby Alyssa's death in
6 November 2006. Additionally, language in the August 2007 Agreement is substantially different from
7 language in the contract governing this case, which merely requires the Summerlin Defendants to
8 maintain insurance. Thus, as the party seeking indemnity Baxa must prove both that it was legally
9 liable to the Shinns and that the amount of its settlement with them was reasonable.

10 The documents the Summerlin Defendants seek from Baxa directly reflect Baxa's analysis of
11 the Shinns' claims against it, its legal strategy in defending the Shinns' claims, its decision to mediate
12 with the Shinns, and its ultimate decision to settle with them. Baxa has plainly put the documents the
13 Summerlin Defendants seek at issue. Moreover, even if Baxa is only required to prove that it was
14 potentially liable to the Shinns the same documents put Baxa's potential liability at issue.

15 The Summerlin Defendants maintain they have complied with the requirements to submit a
16 certification required by Rul 37(a)(1) and L.R. 26-7 because on February 17, 2011 they filed a
17 Supplement to their Motion to Compel (Dkt. #116) which submits the certification required, which was
18 inadvertently omitted from the original.

19 Finally, the Summerlin Defendants argue their motion to compel was timely filed. In *Gault v.*
20 *Nabisco Biscuit Co.*, 184 F.R.D. 620, 622 (D. Nev. 1999), the court held that a motion to compel filed
21 within the discovery period would rarely be considered untimely. The Summerlin Defendants filed this
22 motion to compel fifteen (15) days after Mr. Crumbaker's deposition was taken, and before the close of
23 discovery. Additionally, it was filed as promptly as possible "in light of the discovery process". The
24 motion to compel only ripened when, in addition to refusing to produce the documents in dispute,
25 Baxa's counsel instructed its Rule 30(b)(6) witness not to answer certain questions. The motion was
26 filed approximately two weeks after the Rule 30(b)(6) deposition was taken. The Summerlin
27 Defendants dispute that granting the motion to compel will result in any unnecessary delay because the
28 Summerlin Defendants have specifically identified the documents they seek from Baxa's privilege log.

If the motion to compel is granted, Baxa would need only to produce documents it has presumably gathered and identified while preparing its privilege log.

DISCUSSION

Fed. R. Civ. P. 37(a)(1) permits a party to file a motion to compel disclosure of discovery. It provides in pertinent part: “The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action.”

Local Rule 26-7(b) also provides:

Discovery motions will not be considered unless a statement of moving counsel is attached thereto certifying that, after personal consultation and sincere effort to do so, counsel have been unable to resolve the matter without court intervention.

Fed. R. Civ. P. 37(a)(1) and Local Rule 26-7(b) serve several important purposes. First, the parties are required to meet and confer “to lessen the burden on the court and reduce the unnecessary expenditure of resources by litigants, through promotion of informal, extra-judicial resolution of discovery disputes.” *Nevada Power v. Monsanto*, 151 F.R.D. 118, 120 (D. Nev. 1993). Second, the meet-and-confer obligations “promote a frank exchange between counsel to resolve issues by agreement or to at least narrow and focus the matters in controversy before judicial resolution is sought”. *Id.* For the meet-and-confer obligations to serve their purpose, it is essential “that parties treat the informal negotiation process as a substitute for, and not simply a formal prerequisite to, judicial review of discovery disputes.” *Id.* To accomplish this requirement,

[t]he parties must present to each other the merits of their respective positions with the same candor, specificity, and support during informal negotiations as during the briefing of discovery motions. Only after all the cards have been laid on the table, and a party has meaningfully assessed the relative strengths and weaknesses of its position in light of all available information, can there be “a sincere effort” to resolve the matter.

Id. Judicial intervention should only occur when either informal negotiations have reached an impasse on the substantive issues in dispute, or one party has acted in bad faith by either refusing to negotiate or provide specific support for its claims. *Id.*

The court should not consider a motion to compel unless the moving party provides a certification of counsel which “accurately and specifically convey to the court who, where, how, and when the respective parties attempted to personally resolve the discovery dispute.” *Shufflemaster, Inc.*

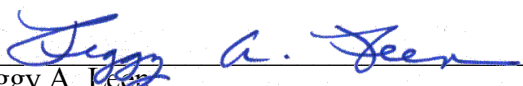
1 *v Progressive Games, Inc.*, 170 F.R.D. 166, 170 (D. Nev. 1996). Additionally, the moving party must
2 actually perform the obligation to confer or attempt to confer in good faith to resolve the discovery
3 dispute without court intervention. *Id.* To accomplish the underlying policy of Local Rule 26-7(b) and
4 Fed. R. Civ. P. 37(a)(1), the moving party must include more than a cursory statement that counsel have
5 been “unable to resolve the matter” and “must adequately set forth in the motion essential facts
6 sufficient to enable the court to pass a preliminary judgment on the adequacy and sincerity of the good
7 faith conferment between the parties.” *Id.* at 171. A good faith attempt to resolve the discovery dispute
8 without court intervention involves more than “the perfunctory parroting of statutory language on the
9 certificate to secure court intervention,” and requires “a genuine attempt to resolve the discovery
10 dispute through non-judicial means.” *Id.*

11 Having reviewed and considered the matter, the court finds that the Summerlin Defendants have
12 not met their meet and confer obligations. The motion does not contain a certification of counsel as
13 required by LR 26-7(b). Rather, the motion merely states that the “parties have previously conducted
14 multiple meets and confers (sic) regarding this discovery dispute.” The motion attaches letters
15 exchanged from counsel in July, August and early September 2010. Baxa served a supplemental
16 response to request number 1 providing documents Baxa exchanged with counsel for the Shinns on
17 September 10, 2010. However, nothing in the motion indicates that there were any further efforts to
18 resolve this matter, and the motion was not filed until January 27, 2011, two weeks after the deposition
19 of Baxa’s corporate representative and Rule 30(b)(6) designee on January 11, 2011. LR 26-7(b) is
20 explicit: no discovery motion will be considered unless a statement of moving counsel is attached
21 certifying that after personal consultation and a sincere effort to do so, counsel have been unable to
22 resolve the matter without court action.

23 Having reviewed and considered the matter,

24 **IT IS ORDERED** The Summerlin Hospital Defendants’ Motion to Compel (Dkt. #112) is
25 **DENIED.**

26 Dated this 21st day of June, 2011.

27 
28 Peggy A. Lee
United States Magistrate Judge